

ClearComm

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November 24, 1997

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Ms. Magalie Roman Salas  
Secretary  
FEDERAL COMMUNICATIONS COMMISSION  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

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NOV 24 1997

Re: *Amendment of the Commission's Rules Regarding Installment Payment  
Financing For Personal Communications Services (PCS) Licensees,  
FCC 97-342, released October 16, 1997 (Second Report and Order in  
WT Docket No. 97-82)*

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Dear Madam Secretary:

On behalf of ClearComm, L.P., and pursuant to Section 1.429(h) of the Commission's rules, 47 C.F.R. § 1.429(h) (1996), I enclose an original and eleven (11) copies of its Petition for Partial Reconsideration in the proceeding referenced above. Kindly date-stamp and return to the courier the receipt copy of this filing designated for that purpose. You may direct any questions concerning this matter to the undersigned.

Respectfully submitted,

*Tyrone Brown* (by *hoo*)  
Tyrone Brown  
Senior Vice President

**Enclosures**

ClearComm, LP

1750 K Street NW

Washington, DC 20006

Phone (202) 828-4926

Fax (202) 429-7049

cc: The Honorable William E. Kennard  
The Hon. Susan Ness  
The Hon. Harold W. Furchtgott-Roth  
The Hon. Michael K. Powell  
The Hon. Gloria Tristani  
Ari Fitzgerald, Esquire  
David R. Siddall, Esquire  
Kevin Martin, Esquire  
Peter A. Tenhula, Esquire  
Karen Gulick, Esquire  
Daniel Phythyon, Esquire  
Rosalind Allen, Esquire  
Kathleen O'Brien Ham, Esquire  
Jerome Fowlkes, Esquire  
Sandra Danner, Esquire

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BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
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Amendment of the Commission's )  
Rules Regarding Installment Payment )  
Financing for Personal Communications )  
Services (PCS) Licensees )

WT Docket No. 97-82

To: The Commission

PETITION FOR PARTIAL RECONSIDERATION  
OF CLEARCOMM, L.P.

CLEARCOMM, L.P.

Tyrone Brown, Esquire  
Senior Vice President  
CLEARCOMM, L.P.  
1750 K Street, N.W.  
Eighth Floor  
Washington, D.C. 20006  
(202) 828-4926

Date: November 24, 1997

## TABLE OF CONTENTS

I.	INTRODUCTION AND SUMMARY .....	2
II.	THE DOWN PAYMENT FORFEITURE FOR DISAGGREGATING SMALL BUSINESS LICENSEES IS UNWARRANTED AS A MATTER OF LAW, DOES NOT FURTHER THE PUBLIC INTEREST, AND WILL HARM CONSUMERS .....	6
A.	The <i>Order</i> Provides No Reasoned Explanation Supporting Imposition Of The Forfeiture .....	6
B.	The Proposed Down Payment Forfeiture Is Unwarranted As A Matter of Law In The Disaggregation Context .....	8
C.	Application Of A Disaggregating Licensee's Residual Down Payment Funds Toward The Licensee's Interest Obligations For The Period Of Payment Suspension And The Current Period Would Better Serve the Public Interest .....	13
1.	<i>Forfeiture Would Undermine The Core Public Policy Objectives Of Section 309(j) Of The Communications Act</i> ....	13
2.	<i>The Commission Should Permit Disaggregating Small Businesses To Apply The Balance Of Their Down Payments Now On Deposit Toward The Outstanding Interest They Currently Owe The Commission</i> .....	15
D.	Assuming, <i>Arguendo</i> , That The Commission Does Not Eliminate Entirely The Down Payment Forfeiture, At A Minimum, Licensees Electing Disaggregation Should Not Receive Less Favorable Treatment Regarding Disposition Of Down Payments Than Those Electing Prepayment .....	18
III.	CONCLUSION .....	21

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To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

ClearComm, L.P. ("ClearComm"), by its attorneys, and pursuant to Sections 1.429(a), (d) and 1.4(b)(3) of the Commission's rules, 47 C.F.R. §§ 1.429(a), (d), 1.4(b)(3) (1996), hereby petitions the Federal Communications Commission ("FCC" or "Commission") to reconsider a portion of its *Second Report and Order* ("Order") released October 16, 1997, in the proceeding captioned above.<sup>1/</sup> Specifically, ClearComm asks the Commission to modify the *Order* in one narrow respect: to rescind the forfeiture of fifty percent of the total down payments made by small businesses who elect the disaggregation option and instead permit them to apply that fifty percent of the down payment toward their outstanding interest

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<sup>1/</sup> *Amendment of the Commission's Rules Regarding Installment Payment Financing For Personal Communications Services (PCS) Licensees*, FCC 97-342, released October 16, 1997 (*Second Report and Order and Further Notice of Proposed Rule Making* in WT Docket No. 97-82) (hereinafter "*Order*"). The *Order* anticipated publication in the Federal Register, see *Second Report and Order*, slip op. at 49 ¶ 108, and a summary of the *Order* appeared in the Federal Register on October 24, 1997. See 62 FED. REG. 55348 (Oct. 24, 1997). Accordingly, this Petition is timely filed. See 47 C.F.R. §§ 1.429(d), 1.4(b)(3).

obligations to the Commission following disaggregation. As presently formulated, the Commission's apparent plan to require the small businesses availing themselves of the disaggregation option to forfeit fifty percent of their total down payments cannot be justified as a matter of law or public policy and should be eliminated on reconsideration.

## **I. INTRODUCTION AND SUMMARY**

Following a six-month proceeding during which it weighed input from all interested parties and carefully considered the difficult dimensions of the C block financing dilemma, the Commission, in the *Order*, adopted a package of alternative measures designed to respond to the capital crisis faced by many C block small business licensees while also protecting the fairness and integrity of the Commission's auction processes.<sup>2/</sup> ClearComm participated actively in this proceeding.

Viewed broadly, the menu of options crafted by the Commission -- including disaggregation, amnesty, and prepayment -- represents a reasonable, legally sustainable, and philosophically consistent compromise in the face of extraordinarily difficult circumstances. However, in one narrow but crucial respect, the *Order* adopts a provision as part of the disaggregation option that is not justified by law or precedent, runs contrary to the core public interest objectives the Commission sought to achieve in the *Order*, and treats disaggregating licensees

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<sup>2/</sup> *Second Report and Order*, slip op. at 2 ¶ 1.

more harshly than those which abandon entire licenses under the prepayment option.

Specifically, the executive summary of the *Order* states that where a C block licensee elects to disaggregate and surrender one-half of its spectrum to the Commission, "[f]ifty percent of the down payment for those licenses will be applied towards the debt for the retained spectrum . . . ."<sup>3/</sup> However, without any elaboration or supporting rationale, the summary goes on to state that "the licensee will not get a refund or credit of the other 50% of its deposit."<sup>4/</sup> It is the disposition of this "other 50%" of the down payment deposit which concerns ClearComm.

ClearComm respectfully submits that imposing a forfeiture of these funds (hereinafter, the "Residual Down Payment Funds") upon the small business licensees electing the disaggregation option is unsustainable as a matter of law and unwise as a matter of policy. It contravenes the disaggregation principles already established in the Commission's rules, upon which the disaggregation option is based. Unlike the amnesty or prepayment options, disaggregation does not involve the surrender of even a single license nor does it otherwise implicate a default to which a penalty should apply.

Depriving disaggregating small businesses of the use of this important and substantial portion of the precious capital already raised by them and deposited with the Commission seriously undermines virtually all of the core public policy objectives of the C block auction: It directly conflicts with the statutory objectives of

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<sup>3/</sup> *Id.*, slip op. at 4 ¶ 6.

<sup>4/</sup> *Id.* (emphasis added).

Section 309(j) to ensure that small and minority-owned businesses receive a meaningful opportunity to participate in the telecommunications sector and the Commission's objective of encouraging rapid deployment of wireless service by these entities. By impairing the ability of these small entrepreneurs to utilize disaggregation to compete effectively in the market, it will also directly imperil the emergence of genuine competition in the marketplace, thereby increasing the unfortunate trend toward greater consolidation.

Moreover, the forfeiture of the Residual Down Payment Funds would yield no countervailing public policy benefits to offset the foregoing sacrifices. The very nature of the disaggregation option, and the safeguards the Commission has crafted to govern its usage, make the forfeiture unnecessary to preserve in any way the integrity of the auction process or fairness to other bidders. Its effect is only to yield a windfall to the Treasury without enhancing the development of new telecommunications services.

ClearComm's circumstances vividly illustrate the starkly counterproductive effect that the *Order's* down payment forfeiture would have. If allowed to stand, the forfeiture would wrest from ClearComm approximately \$17 million in critically needed capital -- capital which is far harder to access in today's financial markets than prior to the C block auction. This loss would require ClearComm to raise that \$17 million in cash a second time and allocate a substantial part of it initially to pay interest on its debt obligations to the Commission -- a use of capital which does not further actual deployment of competitive PCS services.

The public interest would be far better served by permitting a small business, following disaggregation, to apply its Residual Down Payment Funds toward the outstanding interest obligation the licensee owes the Commission. Affording these small start-up companies full value for their financial resources already in the Commission's possession will enable them to direct their remaining, already scarce, capital to its best use: build-out of the licensees' markets.

Assuming, *arguendo*, that the Commission decides to preserve some down payment forfeiture for small businesses electing disaggregation, then it should reexamine the amount of the forfeiture imposed and reduce it commensurately in recognition of these licensees' continuing commitment to serve all of the markets for which they have been licensed. The penalty of fifty percent of the total down payment is far harsher than the thirty percent down payment forfeiture which the Commission applied to the prepayment option.

In the event the Commission does not dispense with the down payment penalty for disaggregating small businesses, at a minimum, it should make the penalty functionally equivalent to that in the prepayment context. Therefore, the maximum penalty imposed should be no more than thirty percent of the Residual Down Payment Funds (*i.e.*, fifteen percent of the total down payment).



**II. THE DOWN PAYMENT FORFEITURE FOR DISAGGREGATING SMALL BUSINESS LICENSEES IS UNWARRANTED AS A MATTER OF LAW, DOES NOT FURTHER THE PUBLIC INTEREST, AND WILL HARM CONSUMERS**

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**A. The Order Provides No Reasoned Explanation Supporting Imposition Of The Forfeiture**

It is axiomatic that an administrative agency, in rendering its decision, "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made,' and its failure to do so requires reversal." *Motor Vehicle Mfrs. Assn. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); accord *American Mining Congress v. United States EPA*, 907 F.2d 1179, 1187-91 (D.C. Cir. 1990). In this case, the Commission has failed to satisfy its obligation to provide a reasoned explanation with respect to the disaggregation forfeiture penalty.

In its discussion of disaggregation in the *Order*, the Commission described that option as requiring the electing licensee to surrender 15 MHz of its spectrum in each market it chooses to disaggregate.<sup>5/</sup> Moreover, the Commission stated that, if the licensee chooses to disaggregate a particular Basic Trading Area ("BTA") market, it must also disaggregate every other BTA it owns within the same Major Trading Area ("MTA").<sup>6/</sup>

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<sup>5/</sup> *Id.*, slip op. at 20 ¶ 38.

<sup>6/</sup> *Id.* The Commission specifically requires disaggregating licensees to return the half of their spectrum consisting of the paired frequencies from 1895 - 1902.5 MHz and from 1975 - 1982.5 MHz, which the Commission notes is contiguous with

In exchange for the return of this spectrum for reauction, the Commission stated that it “will reduce the amount of the debt owed by an amount equal to the *pro rata* portion of the spectrum returned to the Commission, *i.e.*, by 50% . . . .”<sup>7/</sup> With respect to the deposits already made by licensees, the Commission stated that it “will retain the *pro rata* portion of the down payments applicable to the spectrum”<sup>8/</sup> — *i.e.*, also fifty percent.

Nowhere in the *Order* does the Commission provide analytical support for the proposition that disaggregating small businesses will be required to forfeit fifty percent of their total down payments. The absence of such an analysis is in stark contrast to the extensive treatment the Commission devoted to the down payment forfeitures associated with the amnesty and prepayment options.<sup>9/</sup>

Whatever the reason for this omission, the absence of a cogent rationale in the *Order* dictates that the Commission reconsider the penalty and either explain or abandon it. ClearComm urges the Commission to eliminate the penalty because, as the discussion below makes clear, the rationales which support imposition of a down payment forfeiture in the amnesty and prepayment contexts do not apply in the fundamentally different disaggregation context. On the contrary, imposing such a penalty upon disaggregating licensees undermines the core objectives which the Commission’s menu approach was designed to advance.

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the PCS F block. *Id.*, slip op. at 21 ¶ 39.

<sup>7/</sup> *Id.*, slip op. at 21 ¶ 40.

<sup>8/</sup> *Id.*

<sup>9/</sup> See discussion, *infra*, at 8-9.

**B. The Proposed Down Payment Forfeiture Is Unwarranted  
As A Matter of Law In The Disaggregation Context**

The Commission justified its decision to require forfeiture of all (in the case of the amnesty option) or part (in the case of the prepayment option) of a licensee's down payment by drawing an analogy to its treatment of defaulting bidders and by looking at the particular equities involved. However, as demonstrated below, neither the default analogy nor the equities support imposition of a forfeiture in the case of the disaggregation option. Accordingly, imposition of a down payment forfeiture penalty on licensees electing the disaggregation option is unwarranted.

In the amnesty context, the Commission determined that forfeiture of the down payment was reasonable in order to place licensees electing amnesty on a level playing field with new entrants in a reauction of the surrendered spectrum. Relying on the default analogy, the Commission reasoned that withholding of the down payment would

discourage speculation and ensure that all bidders, new entrants as well as existing licensees, participate in the reauction without undue advantage. Retention of the down payments — 10% of the bid price for most licensees — is consistent with our previous decisions and actions affecting C block bidders in that we have retained any payments made by those C block bidders who have failed to make their first or second down payments. We believe that by not finding these licensees in default and assessing any applicable default payments, we are according them a substantial benefit.<sup>10/</sup>

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<sup>10/</sup> *Second Report and Order*, slip op. at 27-28 ¶ 55 (footnote omitted).

The Commission articulated a similar theory for its treatment of the prepayment option. Requiring licensees to forfeit thirty percent of their down payments as a penalty, the Commission stated:

We note that 30% of the down payment is equal to 3% of the net high bids and is consistent with the approach adopted previously for down payments. Under our existing rules, an applicant is subject to a 3% payment if it fails to make the required down payment. Furthermore, previously we have indicated that these payments will discourage default and ensure that bidders have adequate financing and that they meet all eligibility and qualification requirements.<sup>11/</sup>

In addition, the Commission expressed concern that failure to impose such a penalty would impair the integrity of future auctions stating that “[i]f licensees were able to use all of their down payments, they would recoup in full what they paid, and there would be no deterrent effect against bidding excessively in the auction or otherwise gaming the process.”<sup>12/</sup>

However, none of these foregoing rationales logically applies to small businesses electing disaggregation. In the first place, under the disaggregation scheme adopted in the *Order*, licensees electing that option are precluded from participating in the reauction relative to their surrendered spectrum, or from otherwise reacquiring it on the secondary market for two years following the commencement date of the reauction. Accordingly, no possibility exists that a disaggregating licensee will derive an unfair advantage *vis-à-vis* new entrants in any reauction. Thus, the primary concern which is present in the amnesty context

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<sup>11/</sup> *Id.*, slip op. at 33 ¶ 65 (footnotes omitted).

<sup>12/</sup> *Id.*

simply does not arise under the disaggregation option. This same safeguard also eliminates any risk that disaggregating small businesses will "game" the auction in the manner presented by the prepayment option.

Second, unlike the other options, disaggregation presents no specter of default: The small business electing disaggregation has made the down payments on each of its markets in a timely fashion and, following disaggregation, will retain all of its licenses and its commitment to serve the public in those communities. Further, by electing disaggregation, small business licensees, such as ClearComm, virtually ensure additional competition for PCS services in these communities which will flow from the telecommunications services to be provided by the winning bidders in the reauction of the returned 15 MHz of spectrum. These facts fundamentally distinguish disaggregation from the other options adopted by the Commission: Both amnesty and prepayment contemplate the return of licenses to the Commission — the abandonment of markets which the licensees purchased at the auction. Such abandonment much more closely approximates an event of default than does disaggregation.

Indeed, the Commission noted this distinction in its discussion of the penalty to be applied to licensees electing the prepayment option, stating: "[W]e emphasize that permitting licensees access to the down payments they previously made for licenses they no longer wish to retain is a substantial benefit . . . .<sup>13/</sup> Unlike prepaying licensees, however, small business entrepreneurs electing disaggregation

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<sup>13/</sup> *Id.* (emphasis added).

are not surrendering any licenses. They will be obligated to serve each and every market where they were awarded a license. Yet, they are being compelled to forfeit fifty percent of their total down payment for licenses they will retain, a result completely contrary to the explanation quoted immediately above for the treatment of down payments in the prepayment option.

Moreover, the Commission has elsewhere made clear that, far from warranting censure, disaggregation is an acceptable, and indeed in some circumstances a desirable course for a licensee to pursue. The *Order* itself acknowledges that “[e]xisting Commission rules permit broadband PCS licensees to disaggregate their spectrum.”<sup>14/</sup> In adopting those liberalized disaggregation rules, the Commission acknowledged that eliminating the previous restrictions on disaggregation served many of the same goals which the *Order* seeks to achieve in this proceeding. Specifically, the Commission envisioned that liberalized disaggregation would help reduce barriers to market entry, ensure efficient use of spectrum, expedite access to broadband PCS service, and facilitate competition.<sup>15/</sup>

The Commission's existing disaggregation rules impose no penalty upon licensees who choose to disaggregate their spectrum to private third parties. While the rules do restrict a C block licensee from disaggregating its spectrum to non-

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<sup>14/</sup> *Id.*, slip op. at 17 ¶ 32 (citing *Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees*, 11 FCC Rcd 21831 (1996) (*Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 96-148 and GN Docket No. 96-113*) (hereinafter, “*Disaggregation Order*”); 47 C.F.R. § 24.714).

<sup>15/</sup> *Disaggregation Order*, 11 FCC Rcd at 21858.

entrepreneurs for the first five years of the license,<sup>16/</sup> and require a non-eligible (*i.e.*, non-entrepreneur) recipient of disaggregated spectrum to pay to the Commission the entire *pro rata* portion of the debt associated with its spectrum within 30 days of the conditional grant of the assignment of the disaggregated spectrum,<sup>17/</sup> nothing in Section 24.714 of the Commission's rules provides for a loss of any portion of a licensee's down payment in the event of such a disaggregation to a private party.

Moreover, there is no apparent reason to impose such a forfeiture simply because it is the Commission that is recovering the spectrum. To the contrary, the circumstances which might warrant a penalty of some sort appear to be less evident where the Commission is the recipient of the spectrum. As the *Order* observes, return of the spectrum to the Commission presents no concern of unjust enrichment and it affords the Commission another means of making more efficient use of the spectrum.<sup>18/</sup> Moreover, disaggregation affords no windfall or unfair advantage to the disaggregating small business licensee, who continues to pay for spectrum at its net high bid price while the Commission continues to receive full payment for the spectrum which the licensee retains.<sup>19/</sup>

As the foregoing discussion demonstrates, the Commission's apparent intention to require small businesses electing the disaggregation option to forfeit fifty percent of their total down payments is unsupported by the rationales which

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<sup>16/</sup> See 47 C.F.R. § 24.714(a)(3) (1997).

<sup>17/</sup> See *id.* § 24.714(d)(2)(ii).

<sup>18/</sup> *Second Report and Order*, slip op. at 21 ¶ 41, 22 ¶ 43.

<sup>19/</sup> *Id.*, slip op. at 22 ¶ 43.

justified forfeiture penalties in the amnesty and prepayment contexts. Moreover, the penalty is incompatible with the principles underlying the Commission's existing disaggregation rules. Accordingly, it should be eliminated.

**C. Application Of A Disaggregating Licensee's Residual Down Payment Funds Toward The Licensee's Interest Obligations For The Period of Payment Suspension And The Current Period Would Better Serve the Public Interest**

Notwithstanding the lack of any legally sustainable rationale for its decision, the Commission imposed a forfeiture of fifty percent of a small business' total down payment. The critical adverse impact this capital deprivation will have upon the competitive vitality of small business licensees like ClearComm which elect the disaggregation option also demonstrates that the penalty is unwise and contrary to the public policy objectives manifest in Section 309(j).

**1. Forfeiture Would Undermine The Core Public Policy Objectives Of Section 309(j) Of The Communications Act**

In relevant part, Section 309(j) of the Communications Act of 1934, as amended, directs the Commission to “[1] promot[e] economic opportunity and competition and [2] ensur[e] that new and innovative technologies are readily accessible to the American people by avoiding excessive concentration of licenses and by disseminating licenses among a wide variety of applicants, including small businesses . . . .”<sup>20/</sup> In the *Order*, the Commission acknowledged this statutory

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<sup>20/</sup> 47 U.S.C. § 309(j)(3)(B),(4)(D).



mandate as one of the guiding principles which informed its deliberations in formulating the menu of remedies for C block licensees.<sup>21/</sup>

The Commission further stated that the remedies it proposed in the *Order* were necessary to “facilitate use of C block licenses without further regulatory or marketplace delay”<sup>22/</sup> and emphasized that its “menu approach is intended to provide options to facilitate the rapid introduction of service to the public . . .”<sup>23/</sup> The requirement that disaggregating small businesses sacrifice fifty percent of their total down payments -- all of their down payments in respect of the returned spectrum -- actually works to undermine these important objectives by denying small businesses electing disaggregation critical capital that could otherwise be applied to system construction.

This result is sadly ironic in view of the primary objective of the *Order*, namely, to help small business C block licensees overcome the effects of the present drought in the capital markets. As the Commission recognized when it originally adopted special bidding credits and installment financing for designated entities, the acquisition of operating capital is perhaps the most difficult task confronting small start-up businesses. The forfeiture imposed by the *Order* thus strikes at the greatest vulnerability of these small business, the availability of cash, and imposes the greatest hardship upon them.

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<sup>21/</sup> *Second Report and Order*, slip op. at 3 ¶ 2; see also *id.*, slip op. at 13 ¶ 21.

<sup>22/</sup> *Id.*, slip op. at 3 ¶ 4.

<sup>23/</sup> *Id.* ¶ 5 (emphasis added).

ClearComm, for example, would forfeit \$17 million under the current plan. Denying ClearComm and other small businesses the use of funds already raised with extraordinary effort and placed on deposit with the Commission would simply require these companies to raise the same amount of money a second time from limited external equity or debt markets just to pay interest. By contrast, applying the Residual Down Payment Funds to the small business licensee's outstanding interest obligations to the Commission would permit licensees to channel newly raised capital to expedite the rapid roll-out of service to the public.<sup>24/</sup>

**2. *The Commission Should Permit Disaggregating Small Businesses To Apply The Balance Of Their Down Payments Now On Deposit Toward The Outstanding Interest They Currently Owe The Commission***

The very severe penalty which the *Order* imposes upon disaggregating small businesses might be appropriate if it advanced some broader, more important policy objective; however, that is not the case here. No countervailing public policy will be served by the forfeiture of the down payment funds.

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<sup>24/</sup> The Commission endorsed this line of reasoning in adopting the disaggregation option in the *Order*. Finding the option to be consistent with its obligations under Section 309(j), the Commission stated:

According to a number of commenters, including those in the financial community, a reduced government debt burden and the resulting lower cost per MHz pop will enhance prospects for existing small business licensees to attract debt and equity capital. This, in turn, should assist current C block licensees in moving forward with the deployment of their service offerings.

In contrast to the amnesty or prepayment options, forfeiture in the case of disaggregation is not necessary to protect the integrity of the Commission's auction processes. As the Commission observed in the *Order*, disaggregating small businesses will continue to pay for the retained spectrum at its net high bid price, and the Commission will receive full payment for the spectrum retained by the licensees.<sup>25/</sup>

Nor is the forfeiture necessary out of fairness to disappointed bidders in the original C block auction or to new bidders in the contemplated reauction: The former are no more disadvantaged by a licensee's disaggregation of spectrum to the Commission than they would be by disaggregation to a private party as permitted by the rules. The latter are safeguarded by the Commission's decision to bar disaggregating licensees from participating in any reauction for the disaggregated spectrum, or otherwise reacquiring their disaggregated spectrum on the secondary market for a period of two years from the start of the reauction.<sup>26/</sup>

In short, the forfeiture amounts to nothing more nor less than a pure windfall to the FCC -- akin to a tax on the disaggregation option. No apparent equitable or legal justification exists for affording the Commission such a financial benefit especially where, as here, the disaggregating licensees will have willingly surrendered the *pro rata* portion of the spectrum for reauction. In so far as ClearComm is not seeking a refund of the Residual Down Payment Funds, the only

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<sup>25/</sup> See *id.*, slip op. at 22 ¶ 43.

<sup>26/</sup> See *id.* ¶ 42.

question concerns the appropriate allocation of the funds in the Commission's possession.

ClearComm respectfully submits that allocation of the funds as a tax or a penalty upon licensees achieves no public benefit. The public interest, and the Commission's statutory mandate under Section 309(j) of the Communications Act, will be only be fulfilled by allocation of those funds toward the build out of C block licenses.

Denying the relief ClearComm seeks will harm both the disaggregating small businesses and consumers in contravention of Section 309(j). Imposition of such a financial burden upon disaggregating small business C block entrepreneurs will impair economic opportunities for these companies and undermine competition. As previously noted, the emergence of vital and meaningful competition in the market for PCS services will depend upon how effectively small businesses -- both existing licensees, like ClearComm, and potential new bidders in the reauction -- are able to participate in that market. The forfeiture of capital proposed in the *Order* will only weaken otherwise competitive disaggregating small businesses, perhaps pushing them to consolidate with financially stronger rivals and reducing competition. Indeed, the existence or elimination of the down payment forfeiture for disaggregating entities may be the deciding factor in whether small business licensees can, as a practical matter, avail themselves of the disaggregation option.

Moreover, even assuming that some small businesses could withstand the critical loss in their cash resources that the forfeiture would entail, it is likely that this loss -- and the attendant need to acquire replacement capital -- would delay

some licensees' construction timetables thereby impairing the American people's access to these innovative technologies and services. The loss would also place these small businesses at a material competitive disadvantage relative to their existing competitors in the market and any new competitors who may enter through the purchase at auction of the surrendered 15 MHz of the licensee's spectrum. Finally, forcing disaggregating small business licensees to return to the already limited capital markets for further funding will severely restrict the capital available to potential new, cash-starved, small businesses thereby hampering, and perhaps precluding, meaningful new entry.

After the long delays encountered by the Commission and C block applicants to reach this point, the expedited delivery of C block PCS service to the public should carry particular weight for the Commission as it considers ClearComm's narrow reconsideration request. The foregoing discussion makes clear that this important public interest factor will be best served by eliminating the proposed forfeiture and, instead, applying the Residual Down Payment Funds to reducing the disaggregating licensee's outstanding interest obligations following disaggregation.

**D. Assuming, *Arguendo*, That The Commission Does Not Eliminate Entirely The Down Payment Forfeiture, At A Minimum, Licensees Electing Disaggregation Should Not Receive Less Favorable Treatment Regarding Disposition Of Down Payments Than Those Electing Prepayment**

ClearComm respectfully submits that the considerations in the foregoing two sections strongly support complete elimination of the forfeiture penalty associated

with the disaggregation option and application of the Residual Down Payment Funds to the disaggregating licensee's outstanding interest obligations to the FCC. Nevertheless, if the Commission ultimately concludes that forfeiture of some portion of the down payment is required in the disaggregation context, the Commission should reduce the amount of the forfeiture.

Throughout its discussion of the disaggregation option in the *Order*, the Commission evaluated the characteristics of the disaggregation option in very favorable terms.<sup>27/</sup> Indeed, aside from a concern about unjust enrichment which it resolved by restricting licensees' ability to reacquire their disaggregated spectrum, the Commission identified no concerns with the option whatsoever relative to the integrity of the agency's auction processes or fairness to bidders in the original auction, possible bidders in the reauction, or competitors in other services. Nor did the *Order* ever characterize disaggregation as analogous to a default.

Nevertheless, the Commission imposed a penalty which requires a disaggregating small business to forfeit fifty percent of its total down payments -- 100 percent of its down payment in respect of the spectrum being returned to the Commission. The taxing of fifty percent of a licensee's down payment represents an

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<sup>27/</sup> See, e.g., *id.*, slip op at 20 ¶ 38 (adopting the option "[i]n view of the substantial support and public interest benefits"); *id.*, slip op. at 22 ¶ 43 (disaggregation option "is consistent with our goals in this proceeding and serves the public interest," "does not provide a windfall or unfair advantage to C block licensees availing themselves of the . . . option," and is consistent with the Commission's existing disaggregation rules); *id.*, slip op. at 23 ¶ 44 (The "option is fair and equitable to all interested parties . . . [and] does not materially alter the competitive landscape for CMRS services."); *id.* ¶ 45 (The "option is consistent with our Section 309(j) obligation . . .").

amount approximately equal to five percent of the licensee's net high bid on all of its spectrum. Neither the Commission's rules nor applicable case law support imposition of such a penalty.

The cases cited in the *Order* in support of the Commission's decision to retain 100 percent of the down payments of licensees electing the amnesty option,<sup>28/</sup> do not address the question of the appropriate disposition of down payments for small businesses electing disaggregation, which have timely made all of the requisite down payments and (unlike those seeking amnesty) are retaining the licenses for their markets.

As the *Order* acknowledges, the Commission's PCS default rules impose a penalty of only three percent of the net high bid for a bidder who defaults on a license following the auction.<sup>29/</sup> Indeed, the Commission relied on this analogy as the predicate for imposing only a thirty percent down payment forfeiture penalty on licensees electing the prepayment option.<sup>30/</sup> Based upon the Commission's reasoning in the prepayment context, a more internally consistent penalty for disaggregating licensees would thus be thirty percent of the fifty percent of the

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<sup>28/</sup> See *Mountain Solutions LTD, Inc.*, 12 FCC Rcd 5904 (1997); *C. H. PCS, Inc.*, 11 FCC Rcd 9343 (1996); *BDPCS, Inc.*, 12 FCC Rcd 3230 (1997), cited in *Second Report and Order*, slip op. at 27-28 ¶ 55 n.120.

<sup>29/</sup> See 47 C.F.R. §§ 1.2104(g)(2), 24.704(a)(2), cited in *Second Report and Order*, slip op. at 33 ¶ 65 n.146. Of course, in the true default context, not present here, this 3% penalty is in addition to the licensee's obligation to satisfy the difference between its bid and the amount of the winning bid upon the next reauction of the license.

<sup>30/</sup> See *Second Report and Order*, slip op. at 33 ¶ 65. Since the down payments are ten percent of the bid price, a forfeiture of thirty percent of the down payments equals three percent of the bid price.

down payment related to the returned spectrum - *i.e.*, 15 percent of the licensee's total down payment.

The smaller penalty currently borne by licensees electing prepayment is especially inequitable in light of the clear concerns the Commission held about that option. In sharp distinction to its treatment of the disaggregation option, the Commission noted the lack of a deterrent effect against excessive bidding or "gaming" the auction that the prepayment option would present absent a forfeiture penalty, and underscored the unfairness of permitting prepaying licensees unrestricted access to "down payments they previously made for licenses they no longer wish to retain . . .".<sup>31/</sup> Particularly because, as previously noted, disaggregating licensees will not be utilizing down payments from "licenses they no longer wish to retain," and because they present no threat of "gaming" the reauction, ClearComm respectfully submits that there is simply no basis in law or policy for disfavoring the disaggregation option *vis-à-vis* the prepayment option in terms of the loss of down payment.

### III. CONCLUSION

The foregoing discussion plainly demonstrates that the down payment forfeiture penalty set forth in the *Order* with respect to C block licensees electing the disaggregation option lacks a rational foundation and, more importantly, impairs the public interest. Accordingly, it warrants the Commission's reconsideration.

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<sup>31/</sup> *Id.*



It is important to note that ClearComm is neither requesting nor advocating that the Commission refund the Residual Down Payment Funds to disaggregating small business licensees. Rather, ClearComm desires only a more rational reallocation of the monies already in the Commission's possession. Because such a reallocation would comport with the legal principles underlying disaggregation and, more importantly, would better serve the critical policy objectives the *Order* was intended to accomplish, ClearComm respectfully urges the Commission to reconsider its *Order*, eliminate the requirement that disaggregating small businesses forfeit to the Commission the Residual Down Payment Funds, and apply those funds toward the disaggregating licensee's outstanding interest obligations.

Respectfully submitted,

CLEARCOMM, L.P.

By:

Tyrone Brown (426)

Tyrone Brown, Esquire  
Senior Vice President  
CLEARCOMM, L.P.  
1750 K Street, N.W.  
Eighth Floor  
Washington, D.C. 20006  
(202) 828-4926

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